

AMENDED IN ASSEMBLY SEPTEMBER 2, 2009

AMENDED IN ASSEMBLY AUGUST 24, 2009

AMENDED IN ASSEMBLY JUNE 29, 2009

AMENDED IN SENATE APRIL 27, 2009

AMENDED IN SENATE APRIL 20, 2009

SENATE BILL

No. 313

Introduced by Senator DeSaulnier

February 25, 2009

An act to amend ~~Sections 62.5 and~~ *Section 3722* of the Labor Code, relating to workers' compensation, *and making an appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

SB 313, as amended, DeSaulnier. Workers' compensation: penalty assessments.

Existing law requires every employer, except the state, to secure the payment of workers' compensation. Existing law requires the Director of Industrial Relations to issue and serve on any employer that has failed to secure the payment of workers' compensation a stop order prohibiting the use of employee labor. Under existing law, at the time the stop order is issued and served, the director is required to issue and serve a penalty assessment order requiring the uninsured employer to pay to the director, for deposit into the State Treasury to the credit of the continuously appropriated Uninsured Employers Benefits Trust Fund, the sum of \$1,000 per employee employed at the time the order is issued and served. Existing law provides that in lieu of the aforementioned penalty assessment, at any time that the director determines that an employer

has been uninsured for a period in excess of one week during the calendar year preceding the director's determination, the director may issue and serve a penalty assessment order that requires the uninsured employer to pay to the director, for deposit into the State Treasury to the credit of the Uninsured Employers Benefits Trust Fund, the greater of (1) twice the amount the employer would have paid in workers' compensation premiums during the period the employer was uninsured or (2) the sum of \$1,000 per employee employed during the period the employer was uninsured.

~~This bill would increase the penalty assessment to \$1,500. The bill would specifically provide that any additional moneys collected as a result of the increase in the penalty assessments pursuant to the bill shall be deposited in the State Treasury to the credit of the Uninsured Employers Benefits Trust Fund, but that the moneys be available only upon appropriation by the Legislature. \$1,500 per employee employed during the period the employer was uninsured. Because the money from the increased penalty assessment is deposited into the continuously appropriated Uninsured Employers Fund, this bill would make an appropriation.~~

The bill would also clarify that the director is required to issue and serve either of the above-mentioned penalty assessments.

Existing law provides that if the employer is currently insured, or becomes insured during the period during which the above penalty is being determined, the amount an employer would have paid in workers' compensation premiums shall be calculated by prorating the current premium for the number of weeks the employer was uninsured.

Existing law provides that if the employer is uninsured at the time the above penalty is being determined, the amount an employer would have paid in workers' compensation premiums shall be calculated by applying the weekly premium per employee on file with the Insurance Commissioner to the number of weeks the employer was uninsured. Existing law provides that each employee of the uninsured employer shall be assumed to be assigned to the governing classification for that employer as determined by the director after consultation with the Insurance Commissioner. Existing law provides that if the employer contends that the assignment of the governing classification is incorrect, or that any employee should be assigned to a different classification, the employer has the burden to prove that the different classification should be utilized.

This bill would require that, if the employer is currently insured, or becomes insured during the period during which the above penalty is being determined, the amount an employer would have paid in workers' compensation premiums shall be calculated by prorating the current premium for the number of weeks the employer was uninsured within the 3-year period immediately prior to the date the above penalty assessment is issued.

This bill would also provide that if the employer is uninsured at the time the above penalty is being determined, the amount an employer would have paid in workers' compensation premiums shall be the product of the employer's payroll for all periods of time the employer was uninsured within the 3-year period immediately prior to the date the above penalty assessment is issued multiplied by a rate determined in accordance with regulations that may be adopted by the director or, if none have been adopted, the manual rate or rates of the State Compensation Insurance Fund for the employer's governing classification, as determined by the director, pursuant to the standard classification system approved by the Insurance Commissioner. This bill would provide that, unless the amount of the employer's payroll for all periods during which the employer was uninsured within the 3-year period is otherwise proven by a preponderance of evidence, the employer's payroll for each week the employer was uninsured shall be presumed to be the state average weekly wage, as defined, multiplied by the number of persons employed by the employer at the time the penalty assessment is issued.

Vote: ~~majority~~^{2/3}. Appropriation: ~~no~~-yes. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Section 62.5 of the Labor Code is amended to~~
2 ~~read:~~
3 ~~62.5. (a) (1) The Workers' Compensation Administration~~
4 ~~Revolving Fund is hereby created as a special account in the State~~
5 ~~Treasury. Money in the fund may be expended by the department,~~
6 ~~upon appropriation by the Legislature, for all of the following~~
7 ~~purposes, and may not be used or borrowed for any other purpose:~~
8 ~~(A) For the administration of the workers' compensation~~
9 ~~program set forth in this division and Division 4 (commencing~~

1 with Section 3200), other than the activities financed pursuant to
2 Section 3702.5.

3 ~~(B) For the Return-to-Work Program set forth in Section 139.48.~~

4 ~~(C) For the enforcement of the insurance coverage program~~
5 ~~established and maintained by the Labor Commissioner pursuant~~
6 ~~to Section 90.3.~~

7 ~~(2) The fund shall consist of surcharges made pursuant to~~
8 ~~paragraph (1) of subdivision (f).~~

9 ~~(b) (1) The Uninsured Employers Benefits Trust Fund is hereby~~
10 ~~created as a special trust fund account in the State Treasury, of~~
11 ~~which the director is trustee, and its sources of funds are as~~
12 ~~provided in paragraph (1) of subdivision (f). Notwithstanding~~
13 ~~Section 13340 of the Government Code, the fund is continuously~~
14 ~~appropriated for the payment of nonadministrative expenses of the~~
15 ~~workers' compensation program for workers injured while~~
16 ~~employed by uninsured employers in accordance with Article 2~~
17 ~~(commencing with Section 3710) of Chapter 4 of Part 1 of Division~~
18 ~~4, and shall not be used for any other purpose. All moneys collected~~
19 ~~shall be retained in the trust fund until paid as benefits to workers~~
20 ~~injured while employed by uninsured employers.~~
21 ~~Nonadministrative expenses include audits and reports of services~~
22 ~~prepared pursuant to subdivision (b) of Section 3716.1. The~~
23 ~~surcharge amount for this fund shall be stated separately.~~

24 ~~(2) Notwithstanding any other provision of law, all references~~
25 ~~to the Uninsured Employers Fund shall mean the Uninsured~~
26 ~~Employers Benefits Trust Fund.~~

27 ~~(3) Notwithstanding paragraph (1), in the event that budgetary~~
28 ~~restrictions or impasse prevent the timely payment of administrative~~
29 ~~expenses from the Workers' Compensation Administration~~
30 ~~Revolving Fund, those expenses shall be advanced from the~~
31 ~~Uninsured Employers Benefits Trust Fund. Expense advances~~
32 ~~made pursuant to this paragraph shall be reimbursed in full to the~~
33 ~~Uninsured Employers Benefits Trust Fund upon enactment of the~~
34 ~~annual Budget Act.~~

35 ~~(4) Any moneys from penalties collected pursuant to Section~~
36 ~~3722 as a result of the insurance coverage program established~~
37 ~~under Section 90.3 shall be deposited in the State Treasury to the~~
38 ~~credit of the Workers' Compensation Administration Revolving~~
39 ~~Fund created under this section, to cover expenses incurred by the~~
40 ~~director under the insurance coverage program. The amount of~~

1 any penalties in excess of payment of administrative expenses
2 incurred by the director for the insurance coverage program
3 established under Section 90.3 shall be deposited in the State
4 Treasury to the credit of the Uninsured Employers Benefits Trust
5 Fund for nonadministrative expenses, as prescribed in paragraph
6 (1), and notwithstanding paragraph (1), shall only be available
7 upon appropriation by the Legislature.

8 (5) Any additional moneys collected from penalties pursuant
9 to Section 3722 as a result of the increase of those penalties
10 pursuant to the amendments to Section 3722 made by the act that
11 added this paragraph shall be deposited in the State Treasury to
12 the credit of the Uninsured Employers Benefits Trust Fund for
13 nonadministrative expenses, as prescribed in paragraph (1), and
14 notwithstanding paragraph (1), shall be available only upon
15 appropriation by the Legislature.

16 (e) (1) The Subsequent Injuries Benefits Trust Fund is hereby
17 created as a special trust fund account in the State Treasury, of
18 which the director is trustee, and its sources of funds are as
19 provided in paragraph (1) of subdivision (f). Notwithstanding
20 Section 13340 of the Government Code, the fund is continuously
21 appropriated for the nonadministrative expenses of the workers'
22 compensation program for workers who have suffered serious
23 injury and who are suffering from previous and serious permanent
24 disabilities or physical impairments, in accordance with Article 5
25 (commencing with Section 4751) of Chapter 2 of Part 2 of Division
26 4, and Section 4 of Article XIV of the California Constitution, and
27 shall not be used for any other purpose. All moneys collected shall
28 be retained in the trust fund until paid as benefits to workers who
29 have suffered serious injury and who are suffering from previous
30 and serious permanent disabilities or physical impairments.
31 Nonadministrative expenses include audits and reports of services
32 pursuant to subdivision (e) of Section 4755. The surcharge amount
33 for this fund shall be stated separately.

34 (2) Notwithstanding any other law, all references to the
35 Subsequent Injuries Fund shall mean the Subsequent Injuries
36 Benefits Trust Fund.

37 (3) Notwithstanding paragraph (1), in the event that budgetary
38 restrictions or impasse prevent the timely payment of administrative
39 expenses from the Workers' Compensation Administration
40 Revolving Fund, those expenses shall be advanced from the

1 Subsequent Injuries Benefits Trust Fund. Expense advances made
2 pursuant to this paragraph shall be reimbursed in full to the
3 Subsequent Injuries Benefits Trust Fund upon enactment of the
4 annual Budget Act.

5 (d) ~~The Occupational Safety and Health Fund is hereby created~~
6 ~~as a special account in the State Treasury. Moneys in the account~~
7 ~~may be expended by the department, upon appropriation by the~~
8 ~~Legislature, for support of the Division of Occupational Safety~~
9 ~~and Health, the Occupational Safety and Health Standards Board,~~
10 ~~and the Occupational Safety and Health Appeals Board, and the~~
11 ~~activities these entities perform as set forth in this division, and~~
12 ~~Division 5 (commencing with Section 6300).~~

13 (e) ~~The Labor Enforcement and Compliance Fund is hereby~~
14 ~~created as a special account in the State Treasury. Moneys in the~~
15 ~~fund may be expended by the department, upon appropriation by~~
16 ~~the Legislature, for the support of the activities that the Division~~
17 ~~of Labor Standards Enforcement performs pursuant to this division~~
18 ~~and Division 2 (commencing with Section 200), Division 3~~
19 ~~(commencing with Section 2700), and Division 4 (commencing~~
20 ~~with Section 3200). The fund shall consist of surcharges imposed~~
21 ~~pursuant to paragraph (3) of subdivision (f).~~

22 (f) (1) ~~Separate surcharges shall be levied by the director upon~~
23 ~~all employers, as defined in Section 3300, for purposes of deposit~~
24 ~~in the Workers' Compensation Administration Revolving Fund,~~
25 ~~the Uninsured Employers Benefits Trust Fund, the Subsequent~~
26 ~~Injuries Benefits Trust Fund, and the Occupational Safety and~~
27 ~~Health Fund. The total amount of the surcharges shall be allocated~~
28 ~~between self-insured employers and insured employers in~~
29 ~~proportion to payroll respectively paid in the most recent year for~~
30 ~~which payroll information is available. The director shall adopt~~
31 ~~reasonable regulations governing the manner of collection of the~~
32 ~~surcharges. The regulations shall require the surcharges to be paid~~
33 ~~by self-insurers to be expressed as a percentage of indemnity paid~~
34 ~~during the most recent year for which information is available,~~
35 ~~and the surcharges to be paid by insured employers to be expressed~~
36 ~~as a percentage of premium. In no event shall the surcharges paid~~
37 ~~by insured employers be considered a premium for computation~~
38 ~~of a gross premium tax or agents' commission. In no event shall~~
39 ~~the total amount of the surcharges paid by insured and self-insured~~

1 employers exceed the amounts reasonably necessary to carry out
2 the purposes of this section.

3 ~~(2) The surcharge levied by the director for the Occupational~~
4 ~~Safety and Health Fund, pursuant to paragraph (1), shall not~~
5 ~~generate revenues in excess of fifty-two million dollars~~
6 ~~(\$52,000,000) on and after the 2009–10 fiscal year, adjusted for~~
7 ~~each fiscal year as appropriate to reconcile any over/under~~
8 ~~assessments from previous fiscal years pursuant to Sections 15606~~
9 ~~and 15609 of Title 8 of the California Code of Regulations, and~~
10 ~~may increase by not more than the state-local government deflator~~
11 ~~each year thereafter through July 1, 2013, and, as appropriate, to~~
12 ~~reconcile any over/under assessments from previous fiscal years.~~
13 ~~For the 2013–14 fiscal year, the surcharge level shall return to the~~
14 ~~level in place on June 30, 2009, adjusted for inflation based on the~~
15 ~~state-local government deflator.~~

16 ~~(3) A separate surcharge shall be levied by the director upon all~~
17 ~~employers, as defined in Section 3300, for purposes of deposit in~~
18 ~~the Labor Enforcement and Compliance Fund. The total amount~~
19 ~~of the surcharges shall be allocated between employers in~~
20 ~~proportion to payroll respectively paid in the most recent year for~~
21 ~~which payroll information is available. The director shall adopt~~
22 ~~reasonable regulations governing the manner of collection of the~~
23 ~~surcharges. In no event shall the total amount of the surcharges~~
24 ~~paid by employers exceed the amounts reasonably necessary to~~
25 ~~carry out the purposes of this section.~~

26 ~~(4) The surcharge levied by the director for the Labor~~
27 ~~Enforcement and Compliance Fund shall not exceed thirty-seven~~
28 ~~million dollars (\$37,000,000) in the 2009–10 fiscal year, adjusted~~
29 ~~as appropriate to reconcile any over/under assessments from~~
30 ~~previous fiscal years, and shall not be adjusted each year thereafter~~
31 ~~by more than the state-local government deflator, and, as~~
32 ~~appropriate, to reconcile any over/under assessments from previous~~
33 ~~fiscal years pursuant to Sections 15606 and 15609 of Title 8 of the~~
34 ~~California Code of Regulations.~~

35 ~~(5) The regulations adopted pursuant to paragraph (1) to (4),~~
36 ~~inclusive, shall be exempt from the rulemaking provisions of the~~
37 ~~Administrative Procedure Act (Chapter 3.5 (commencing with~~
38 ~~Section 11340) of Part 1 of Division 3 of Title 2 of the Government~~
39 ~~Code).~~

1 ~~(g) On and after July 1, 2013, subdivision (e) and paragraphs~~
2 ~~(2) to (4), inclusive, of subdivision (f) are inoperative, unless a~~
3 ~~later enacted statute, that is enacted before July 1, 2013, deletes~~
4 ~~or extends that date.~~

5 ~~SEC. 2.~~

6 ~~SECTION 1.~~ Section 3722 of the Labor Code is amended to
7 read:

8 3722. (a) At the time the stop order is issued and served
9 pursuant to Section 3710.1, the director shall also issue and serve
10 a penalty assessment order requiring the uninsured employer to
11 pay to the director, for deposit in the State Treasury to the credit
12 of the Uninsured Employers Fund, the sum of one thousand five
13 hundred dollars (\$1,500) per employee employed at the time the
14 order is issued and served, as an additional penalty for being
15 uninsured at that time or issue and serve a penalty assessment order
16 pursuant to subdivision (b).

17 (b) At any time that the director determines that an employer
18 has been uninsured for a period in excess of one week during the
19 calendar year preceding the determination, the director shall issue
20 and serve a penalty assessment order requiring the uninsured
21 employer to pay to the director, for deposit in the State Treasury
22 to the credit of the Uninsured Employers Fund, the greater of (1)
23 twice the amount the employer would have paid in workers'
24 compensation premiums during the period the employer was
25 uninsured, determined according to subdivision (c), or (2) the sum
26 of one thousand five hundred dollars (\$1,500) per employee
27 employed during the period the employer was uninsured. A penalty
28 assessment issued and served by the director pursuant to this
29 subdivision shall be in lieu of, and not in addition to, any other
30 penalty issued and served by the director pursuant to subdivision
31 (a).

32 (c) If the employer is currently insured, or becomes insured
33 during the period during which the penalty under subdivision (b)
34 is being determined, the amount an employer would have paid in
35 workers' compensation premiums shall be calculated by prorating
36 the current premium for the number of weeks the employer was
37 uninsured within the three-year period immediately prior to the
38 date the penalty assessment is issued. If the employer is uninsured
39 at the time the penalty under subdivision (b) is being determined,
40 the amount an employer would have paid in workers' compensation

premiums shall be the product of the employer's payroll for all periods of time the employer was uninsured within the three-year period immediately prior to the date the penalty assessment is issued multiplied by a rate determined in accordance with regulations that may be adopted by the director or, if none has been adopted, the manual rate or rates of the State Compensation Insurance Fund for the employer's governing classification pursuant to the standard classification system approved by the Insurance Commissioner. The classification shall be determined by the director or the director's designee at the time the penalty assessment is issued on the basis of any information available to the director regarding the employer's operations. Unless the amount of the employer's payroll for all periods during which the employer was uninsured within the three-year period is otherwise proven by a preponderance of evidence, the employer's payroll for each week the employer was uninsured shall be presumed to be the state average weekly wage multiplied by the number of persons employed by the employer at the time the penalty assessment is issued. For purposes of this subdivision, "state average weekly wage" means the average weekly wage paid by employers to employees covered by unemployment insurance as reported by the United States Department of Labor for California for the 12-month period ending March 31 of the calendar year preceding the year in which the penalty assessment order is issued.

(d) If upon the filing of a claim for compensation under this division the Workers' Compensation Appeals Board finds that any employer has not secured the payment of compensation as required by this division and finds the claim either noncompensable or compensable, the appeals board shall mail a copy of their findings to the uninsured employer and the director, together with a direction to the uninsured employer to file a verified statement pursuant to subdivision (e).

After the time for any appeal has expired and the adjudication of the claim has become final, the uninsured employer shall be assessed and pay as a penalty either of the following:

(1) In noncompensable cases, two thousand dollars (\$2,000) per each employee employed at the time of the claimed injury.

(2) In compensable cases, ten thousand dollars (\$10,000) per each employee employed on the date of the injury.

1 (e) In order to establish the number of employees the uninsured
2 employer had on the date of the claimed injury in noncompensable
3 cases and on the date of injury in compensable cases, the employer
4 shall submit to the director within 10 days after service of findings,
5 awards, and orders of the Workers' Compensation Appeals Board
6 a verified statement of the number of employees in his or her
7 employ on the date of injury. If the employer fails to submit to the
8 director this verified statement or if the director disputes the
9 accuracy of the number of employees reported by the employer,
10 the director shall use any information regarding the number of
11 employees as the director may have or otherwise obtains.

12 (f) Except for penalties assessed under subdivision (b), the
13 maximum amount of penalties which may be assessed pursuant
14 to this section is one hundred thousand dollars (\$100,000). Payment
15 shall be transmitted to the director for deposit in the State Treasury
16 to the credit of the Uninsured Employers Fund.

17 (g) (1) The Workers' Compensation Appeals Board may
18 provide for a summary hearing on the sole issue of compensation
19 coverage to effect the provisions of this section.

20 (2) In the event a claim is settled by the director pursuant to
21 subdivision (e) of Section 3715 by means of a compromise and
22 release or stipulations with request for award, the appeals board
23 may also provide for a summary hearing on the issue of
24 compensability.